No. 96-8516

In The

Supreme Court of the United States

October Term, 1997

KENNETH E. BOUSLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

After the Petitioner's Brief was filed in this matter, Thomas C. Walsh was invited to brief and argue the case in support of the judgment below. 118 S. Ct. 463 (1997). Many of the contentions raised in Mr. Walsh's brief ("Amicus Br.") were neither argued by the government nor relied upon by the Eighth Circuit opinion. In particular, the Amicus now claims that Petitioner was accurately informed of the elements of § 924(c) as elucidated in *Bailey v. United States*, 516 U.S. 137 (1995) although the government has explicitly agreed that Bousley did not receive an accurate explanation of the gun charge.[1] *See* Amicus Br. 32-33; *cf.* U.S. Br. 22-29, U.S. Reply 5-6. In support of its new contention, the Amicus Brief materially distorts the record, and misstates Bousley's contentions and the holding in *Bailey*. Once these distortions have been swept aside, the Amicus's contention that Bousley's guilty plea should be immune from attack because it was voluntary must fail as well.

I. *TEAGUE* DOES NOT PRECLUDE THE APPLICATION OF *BAILEY* TO THIS CASE

The briefing explains in detail why *Teague v. Lane*, 489 U.S. 288 (1989) does not mandate refusal to apply *Bailey*'s interpretation of § 924(c) in this case. *See* U.S. Br. 18-21, U.S. Reply 1-5, ACLU Br. 14-17, NACDL/FAMM Br. 11-14. The Amicus Brief disagrees, but its arguments

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[1] The circuit court concluded that the holding in *Bailey* did not apply, because Bousley had "waived" his rights by pleading guilty. 97 F.3d at 287, 289.

actually show how unhelpful the *Teague* analysis is in resolving the issues in this case.

The court's powers are "judicial, not legislative in nature." *United States v. Mackey*, 401 U.S. 667, 697 (1971)(concurring opinion of Justice Harlan). This precept is at the core of *Teague*. Thus, when federal courts construe and apply substantive criminal statutes, they lack jurisdiction to engage in the legislative policymaking which the Amicus Brief argues for. *Compare* Amicus Br. 20-22 with U.S. Reply 2-3; *see also* U.S. Br. 15-16. Instead, the courts must look to the statutory language and to the intent of Congress. *Bailey v. United States*, 116 S. Ct. 501, 506-07 (1995). In short, the courts simply lack the power to rewrite § 924(c) in the manner suggested by the Amicus (at 29-30), so the statute said one thing at the time Bousley pled guilty, and another before and after.[2] *See United States v. Lanier*, 117 S. Ct. 1219, 1226 n. 6 (1997).

The Amicus Brief concedes (at 7) that the *Teague* limitations on retrospectivity apply only to new procedural rules. But although *Teague*'s restrictions apply only to retrospective application of new rules of constitutional procedure, 489 U.S. at 307, *quoting Mackey*, 401 U.S. at 692, the Amicus goes on to assume, without discussion, that *Teague's* limitations completely supplant the rules of

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[2] The government argues that the *Teague* rationale should be used to determine whether this court's rulings on procedural statutes ought to be retrospectively applied. U.S. Br. 19-20. While that issue is not before the Court in this case, it would seem that the normal rules of statutory construction ought to be the starting place for any court charged with interpreting and applying the enactments of Congress. *See Lindh v. Murphy*, 117 S. Ct. 2059 (1997).

statutory construction which apply to substantive federal criminal law. *See* U.S. Reply 2-5. Having assumed its way around the principal issue – viz., whether the *Teague* construct applies here at all – the Amicus Brief assumes without discussion that *Bailey* states a "new" rule of law, as that term is defined in *Teague*,[3] and then purports to find that the *Teague* rationale permits courts to disregard *Bailey*'s interpretation of § 924(c).

The Amicus Brief purports to consider whether the exceptions *Teague* announced to its general prohibition on retrospective application of new procedural rules would apply here. But this discussion actually shows how far afield the Amicus's analysis strays. *See* Amicus Br. 10-12. *Teague* states that "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty." ' " 489 U.S. at 311. Of course, this case involves substantive criminal law, not procedure, so naturally this *Teague* exception is "completely foreign to the issues presented here," (Amicus Br. 12).[4] Having thus observed that an

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[3] A rule is not "new" under *Teague*, if a lower court would have "felt compelled by existing precedent to conclude that the rule the defendant seeks was constitutionally required." *Lambrix v. Singletary*, 117 S. Ct. 1517, 1525 (1997). But contrary to the Amicus Brief's unstated assumption, *Bailey* itself makes clear that its outcome is based on familiar constitutional principles and well-settled rules of statutory construction. 116 S. Ct. 506-08. Thus, *Bailey* merely decided what § 924(c) had always meant, and "why the Courts of Appeals had misinterpreted the will of the enacting Congress." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 513 n. 12 (1994).

[4] It is worth noting, however, that *Bailey* does directly implicate the accuracy of Bousley's conviction. Thus, under

apple is not an orange, the Amicus Brief has also demonstrated that the entire *Teague* analytical framework is inapplicable here.

The Amicus also claims (at 18-20) that cases decided since *Davis v. United States*, 417 U.S. 333 (1974) would permit the Court to ignore its holding in *Bailey* and apply some other construction of § 924(c) in determining whether Bousley's guilty plea was involuntary. In support, Amicus cites *Gilmore v. Taylor*, 508 U.S. 333 (1993), arguing that its holding is inconsistent with the result Bousley seeks here. But *Gilmore* involved errors in giving pattern jury instructions in state court, not a federal defendant who got materially inaccurate information about the charges he faced from the trial judge. The intervening change of law at issue in *Gilmore* spoke only to state procedures, not the substantive definition of a federal crime. It was not claimed in *Gilmore* that the instructions failed to accurately state the law with which the defendant was charged or that they somehow lessened the State's burden of proof below that constitutionally required by cases such as *In re Winship*, 397 U.S. 358 (1970). 508 U.S. at 335. *Davis*, in short, had no bearing on the issues in *Gilmore*, so it is unsurprising that *Davis* is not mentioned there. *See* U.S. Reply 3-4.

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both Justice Harlan's analysis of habeas corpus in *Mackey* and under the statutory grounds for motions made under § 2255, Bousley is entitled to relief. *See* NACDL/FAMM Br. 12; ACLU Br. 15 n. 22

II. BOUSLEY'S GUILTY PLEA IS INVALID BECAUSE IT WAS INVOLUNTARY

A. Petitioner has shown that his guilty plea was involuntary because he did not have a true understanding of the § 924(c) charge at the time he entered his guilty plea. The government agrees. U.S. Br. 22-29; U.S. Reply 5-6, 10-11. The Amicus claims, however, that Bousley did understand the charge because he knew that § 924(c) required "use" of a firearm. Amicus Br. 27, 28, 33. This line of argument relies on distortions of the record and a rationale that would eviscerate the Sixth Amendment right to be informed of the "nature and cause of the accusation."

The Amicus finds it significant that Bousley was told the name of the crime charged under Count II. Amicus Br. 32-33. But Bousley was not adequately advised before his guilty plea as to the true nature of the crime called "use of a firearm during and in relation to" drug trafficking. Merely telling the defendant the *name* of the crime does not reveal its true nature; the elements of the crime must be revealed accurately as well. *See, e.g., Henderson v. Morgan*, 426 U.S. 637 (1976), where the defendant knew he was charged with second degree murder, but not that conviction required proof of intent to kill. 426 U.S. at 649.

Bousley's plea agreement, the transcripts of change of plea hearing and the sentencing hearing, and Bousley's presentence investigation report all show that the gun charge (Count II) was treated by all the responsible parties as a possession offense. And as the government has noted, Bousley's guilty plea agreement is invalid not because he was unaware that he was charged with use of

a firearm during and in relation to drug trafficking, but because the elements of "use" were inaccurately explained to him. U.S. Reply 10-11.

Thus, the Amicus Brief strays from the real issue and picks words out of context when it states (at 32) that Bousley's "plea agreement stipulated that he had 'used' a firearm."[5] In fact, the plea agreement specifically explained that mere ownership and possession of guns near drugs possessed for sale amounted to "use" of firearms in violation of § 924(c),[6] a pronouncement clearly incompatible with *Bailey*. *See* 116 S. Ct. 507-08.

Equally wide of the mark is the Amicus Brief's reference to Bousley's supposed "conscious decision not to seek a jury determination of whether he 'used' a firearm." Amicus Br. 27. Since he was unaware that this charge required proof of active employment of the firearm,

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[5] Although the government concedes that the explanation of the § 924(c) charge was faulty, U.S. Reply 10-11, it too mischaracterizes the plea agreement. Thus, the government erroneously claims that "the plea agreement adequately stipulated to [the] commission" of an offense under § 924(c). U.S. Reply 10.

[6] The paragraph in the plea agreement that explains this count reads as follows:

> 2. The parties also agree that . . . the defendant knowingly used firearms during and in relation to a drug trafficking offense . . . . The following firearms were found in defendant's bedroom near the 6.9 grams of methamphetamine . . . *The defendant admits ownership and possession of these two guns. This conduct constituted a violation of Title 18, United States Code, Section* 924(c) [emphasis added]. (JA 8)

Bousley's purported jury waiver was obviously involuntary.

The government correctly points out that the trial judge told Bousley at the plea colloquy that the use element was satisfied by "possession." The amicus misquotes the trial judge and disagrees.[7] U.S. Reply 10. The Amicus Brief goes on to claim erroneously that Bousley's understanding that the gun count was a possession offense is based on an "isolated statement of the district judge at the Rule 11 colloquy." Amicus Br. 23 n. 7.[8] Here again, the Amicus Brief distorts the record and strays from the real issue. As noted above, the Plea Agreement recites that "ownership and possession" is enough to violate § 924(c), and the trial judge explicitly told Bousley he faced a charge based on "possession of a firearm" when she explained this charge (JA 25-28). Moreover, the

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[7] The Amicus falsely claims that at the change of plea hearing, the trial judge told Bousley that "if he wished to challenge whether he 'used' the guns, he would 'have to go to trial to do that'(JA 28)." Amicus Br. 28 n. 10. At the point cited in the Amicus Brief, the trial judge actually told Bousley that if he wished to contest "whether those firearms were related to your drug trafficking, you'd have to go to trial to do that." JA 28. The trial judge never uttered the words "use" or "used" in connection with the § 924(c) charge. JA 25-28.

[8] Here and in several other places, the Amicus Brief cites to Bousley's questions about the *relationship* of the weapons to the drug charges as somehow illustrating his understanding of the § 924(c) charge. *See, e.g.*, Amicus Br. 24 n. 7; 27-28 n. 10; 33. These mischaracterizations of the record ignore the crucial "active employment" element of § 924(c), which was *not* explained to Bousley or understood by him.

discussion of guns at the evidentiary hearing on September 26, 1990 is in terms of possession (JA 52, 59), and in the Presentence Report Bousley recites his understanding that he had pled guilty to "possession of firearms." (JA 37) The consistent theme in these proceedings is that § 924(c) was a possession crime. There is nothing which suggested to Bousley that the offense of "use" of a firearm included active employment of the guns as an element the government had to prove.

The Amicus Brief claims (at 27-28 n. 10) that Bousley's counsel was "aware long before petitioner filed his appeal that the proper interpretation of 'use' in § 924(c) was a significant issue in his case," citing correspondence between Bousley and his trial counsel. However, the content of those letters illustrates that Bousley was raising the same question he had broached at the change of plea hearing, namely whether his possession of the guns was related to the drug trafficking charge. *See* U.S. Reply 7 n. 4.

Finally, the Amicus Brief finds support for this line of argument in its claim (at 32) that *Bailey* "altered only the evidence necessary to sustain a conviction under § 924(c)." In one sense, of course, the Amicus Brief is correct: it takes different evidence to convict when the elements of the crime are different. *See Henderson v. Morgan*, 426 U.S. 637, 649 (1976). But it is absurd to maintain, as the Amicus Brief does (at 33), that *Bailey* affected only the "quantum of evidence" necessary to establish a violation of § 924(c). As *Bailey* itself points out, mere possession of a weapon is an act different in kind and quality from the "active employment" Congress intended to be reached by "use" under § 924(c). 116 S. Ct. at 507. A

greater quantum of evidence of possession does not show active employment of a firearm by any stretch of the imagination.

B. The government agrees with petitioner, that section 924(c) must be applied as written in determining the voluntariness of Bousley's plea. U.S. Reply 2-3. But the Amicus Brief asserts (at 29) that the voluntariness of a guilty plea must be "measured at the time it is entered." However, this standard is both unprincipled and unworkable, as this case and the Amicus Brief's own arguments illustrate.

The flaw in this argument is that it divorces the definition of federal crimes from statute, authorizing courts to look instead to common law definitions when determining whether a defendant has been informed of the true nature of the charges he faces. Not only does this approach violate settled precedent, *see United States v. Lanier*, 117 S. Ct. 1219, 1226 n. 6 (1997), without the essential statutory touchstone, courts and counsel would lack clear guidance on the elements of federal crimes.

In Bousley's case, for example, the Amicus Brief first claims (at 27) that at the time Bousley's plea was entered, "petitioner had indeed 'used' a gun as 'use' had then been interpreted." Later, however (at 39), the Amicus Brief argues that at the time of Bousley's plea, § 924(c) was the source of "much perplexity in the courts. The Circuits are in conflict. . . . " How then would a reviewing court determine whether Bousley was informed of the true nature of the charges against him? Indeed, under the Amicus Brief's argument, it seems clear that Bousley did not understand the nature of the charges he faced at the

time he entered his plea, for no one told him that there was "much perplexity" among the circuit courts as to what § 924(c) really meant. Having thus abandoned the statutory text and legislative history as the source of meaning for § 924(c), the Amicus Brief posits a rule which virtually guarantees inconsistency and confusion among courts and counsel alike.

The reasons the Amicus advances for this rule are repose and conservation of judicial resources. Amicus Br. 21-22; 47. But it is far from certain that the Amicus's "valid at the time entered" rule would preclude frivolous collateral attacks on guilty pleas or make the job of district judges considering § 2255 motions any easier. Indeed, the clarity and familiarity of the well-worn statutory construction approach which Bousley and the government espouse is at least as practical as the Amicus's proposed rule. Moreover, as the government points out, repose must be tempered with regard for the integrity of the judicial system and principled consistency of analysis. Where the offense to which the defendant has pled guilty turns out not to be a crime at all, the interest in repose must give way. This important result can only be obtained by applying § 924(c) consistently, which requires recognition that the *Bailey* decision controls this case. U.S. Reply 7-8.

The Amicus Brief's proposed rules reflect profound discomfort with the whole notion of collateral attack on guilty pleas.[9] But it is well settled that no procedural

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[9] Indeed, as the government has observed, the Amicus Brief appears to contend that any guilty plea which was "valid at the time entered" is invulnerable to attack, even if the criminal statute was unconstitutional. U.S. Reply 8-9.

device for the taking of guilty pleas is so perfect in design and exercise as to warrant a per se rule rendering it "uniformly invulnerable to subsequent challenge." *Blackledge v. Allison*, 431 U.S. 63, 73 (1977), *citing Fontaine v. United States*, 411 U.S. 213, 215 (1973). Petitioner does not argue that Section 2255 motions should be available for any defendant who merely proclaims his actual innocence, *cf. Herrera v. Collins*, 506 U.S. 390 (1993). Instead, Bousley clearly fits into that small class of defendants who have suffered constitutional wrongs, and for whom the Great Writ is the correct, indeed the only, remedy available.

III. BOUSLEY MUST BE PERMITTED TO PRESENT THE MERITS OF HIS CLAIM

A. Petitioner has explained that procedural default should not be an issue in this case. Pet. Br. 18-21, NACDL/FAMM Br. 14-21. The role of procedural default in § 2255 cases and the unique nature of the constitutional deprivation Bousley has suffered compel this result. In response, the government and the Amicus rely on cases which did not involve a defendant in federal court who was materially misled by the trial judge as to the elements of the charges he faced. Cases such as *Wainwright v. Sykes*, 433 U.S. 72 (1977), which involve the adequate and independent state ground doctrine and the principles of comity and federalism which limit review of state judgments where a federal claim has not been timely

raised, have little to say about this case. *See Trest v. Cain*, 118 S. Ct. 478 (1997).

Here, the trial court, the prosecutor and Bousley's attorney all misled him into believing that he would be convicted on the basis of "possession" of firearms.[10] There is no more profound constitutional deprivation than the one at issue here. Bousley was denied his Sixth Amendment right to know the nature of the charges he faced, induced to plead guilty when he was, in fact, innocent, and never advised of the true nature of the charges until long after his right to appeal had lapsed. Bousley raised this deprivation in this, his first and only § 2255 motion. He should not be defaulted for failing to raise it sooner.

B. Even if Bousley's claim is viewed as defaulted, it should be heard on its merits because he has established that cause exists for his failure to raise the Sixth Amendment deprivation issue on appeal. Pet. Br. 35-36. The government and the Amicus both claim that Bousley's arguments on this issue are grounded in a "futility" exception to the general notion of default. U.S. Br. 36; Amicus Br. 11. However, as explained here and in the prior briefing, Petitioner's argument is not merely that an appeal would have been futile. Pet. Br. 35-36, NACDL/FAMM Br. 21-22, ACLU Br. 22-23. Rather, cause is shown by the trial court's actions which deprived Bousley of his right to accurate information about the true nature of the charges he faced, *see Murray v. Carrier*, 477 U.S. 478, 488

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[10] As explained above, the "during and in relation to drug trafficking" element of the gun charge is not at issue in these proceedings.

(1986), *citing Brown v. Allen*, 344 U.S. 443, 486 (1953); and by the unanticipated result in *Bailey*. *Reed v. Ross*, 468 U.S. 1 (1984).

Thus, the government (U.S. Br. 35-36) and the Amicus's (Amicus Br. 37-38) reliance on *Engle v. Isaac*, 456 U.S. 107 (1982) is misplaced, because that case involved a state habeas petitioner who failed to challenge a self defense instruction in state court on federal grounds. This Court held that his claim that it was "futile" to raise this argument in state court was not a sufficient excuse for his failure to do so. *Id*. at 130. Here, however, Bousley did not consciously fail to argue the invalidity of his guilty plea because of perceived futility. He had been told by the trial court that he was charged with a possession crime, he thought he had pled guilty to a possession crime, JA 25-27, 37, and he had been specifically told by the trial court that the only thing he could appeal was his sentence. JA 21. These official actions also establish cause for Bousley's failure to raise his Sixth Amendment deprivation on direct appeal.

C. As the government has conceded, Bousley's strong showing of actual innocence affords him the right to present the merits of his constitutional claim, regardless of any procedural default. U.S. Br. 40-41; U.S. Reply 12-14. Misconstruing both the law and the facts, the Amicus Brief asserts (at 40-42, 45) that Bousley's actual innocence claim is based on "legal insufficiency,"; and (at 40-41) that Bousley's actual innocence and this Court's opinion in *Schlup v. Delo*, 513 U.S. 298 (1995) cannot be relied upon in this proceeding because Bousley's habeas petition attacks a guilty plea. Amicus is wrong on all of these points.

The Amicus Brief supplies precious little argument and cites no authorities for its proposition that different rules should apply to habeas petitions which attack an invalid guilty plea. The portions of *Schlup* the Amicus cites presuppose a valid guilty plea, not one which was involuntary. And section 2255 does not suggest that different rules apply to motions attacking judgments based on guilty pleas. If anything, a defendant who has entered a guilty plea which is otherwise subject to valid collateral attack has even greater entitlement to the narrow escape path explained in *Schlup* than defendants convicted after a trial, for such a defendant has been induced to forfeit all of his constitutional procedural rights. If he can make the requisite showing of innocence, he is entitled to show the constitutional infirmity in his guilty plea. *See* U.S. Reply 11-15.

The Amicus's overblown rendition of the relief Bousley seeks simply does not match either the facts or the issues before this court. Amicus Br. 46. The undisputed facts in this record establish Bousley's actual innocence of the gun charge. The charges against Bousley stemmed from his arrest while authorities were executing a search warrant. The guns were stored in the headboard of the bed, one of the prototypical examples described in *Bailey* as possession that does not violate § 924(c). 116 S. Ct. at 508. To establish active employment, the government would have to contradict these facts.[11] How "jailhouse writ writers" will be able to establish such a

[11] Neither the government nor the Amicus cites any authority for their suggestions that if Bousley is successful here, his case should be remanded so he could be indicted on new charges never before alleged, such as the "carry" prong of

constitutional violation with a "minimal showing," the Amicus does not say. Moreover, the Amicus has confused the actual innocence gateway with the constitutional showing necessary to obtain relief. Amicus Br. 46.

Thus, contrary to the implications in the Amicus Brief, Bousley's claim is not based on a free standing claim of innocence. Amicus Br. 46; *cf. Herrera v. Collins*, 506 U.S. 390 (1993). Instead, the trial court record reveals the violation of Bousley's Sixth Amendment right to be informed of the true nature of the charges he faces. Bousley merely asks that the same rules of process and substance be applied to his case as are applied in any federal habeas case.

IV. BOUSLEY'S NARROW AND UNUSUAL CLAIM FOR COLLATERAL RELIEF SHOULD BE GRANTED, BECAUSE IT IS BASED UPON A CONSTITUTIONAL DEPRAVATION WHICH UNDERMINES THE RELIABILITY OF HIS GUILTY PLEA

A. Bousley's petition establishes that his imprisonment is wrong, because the trial judge inaccurately explained the elements of the criminal charge to him, his conduct was never made criminal by statute, and he raised his claim at the first opportunity to fully and fairly present it. The Amicus Brief claims (at 21), however, that

§ 924(c). *See* U.S. Br. 41-42; Amicus Br. 49 n. 21. While the remedies in the event of remand are not squarely before the Court, it should be noted that the government and the courts are the ones who erred in obtaining Bousley's erroneous conviction under § 924(c).

permitting collateral attack "every time the reach of a federal criminal statute is narrowed" would result in a "flood of habeas petitions." History is against this argument, though, for cases involving the kind of narrowing at issue here are rare, and post conviction machinery has not been "disabled" when § 2255 motions have followed them. *See* NACDL/FAMM Brief at 8-9.

Equally inaccurate is the Amicus Brief's reliance (at 22-23) on the supposed "give-and-take of plea bargaining" which preceded Bousley's guilty plea. In fact, there was no charge or sentence bargaining at all in this case; Bousley simply pled guilty to the charges in the indictment. JA 9. The only thing the government claims to have given up in reliance on the § 924(c) charge is an appeal of Bousley's sentence.[12] U.S. Br. 9 n. 6. But this post-hoc justification is specious. Neither the government nor the Amicus suggests any ground the government could have used in an appeal from the district court's factual findings on drug quantity. And Bousley's appeal of his sentence would certainly have triggered a cross-appeal, had there been any legal ground for one. In sum, the government gave up virtually nothing in return for Bousley's guilty plea to a non-existent crime.

[12] Significantly, the Eighth Circuit did not rely on this argument, although the government made it below.

CONCLUSION

For the reasons stated above, in Petitioner's Brief and in the briefs of the United States, the ACLU and NACDL/FAMM, Petitioner respectfully requests that the judgment of the Eighth Circuit Court of Appeals be reversed, and that the case be remanded with directions to reverse the judgment of the district court dismissing Bousley's Petition for Writ of Habeas Corpus, and to order that the district court enter a new and different order and judgment setting aside Bousley's plea of guilty plea on Count II of the indictment which charged violation of § 924(c), and dismissing Count II with prejudice.

Respectfully submitted,

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